

ROBERT C. ANDERSON
OIL PROPERTIES

IBLA 85-426

Decided June 10, 1987

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming assessment of liquidated damages and civil penalties for incidents of noncompliance. NM-18498.

Reversed.

1. Notice: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Oil and Gas Leases: Incidents of Noncompliance

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

APPEARANCES: Dr. Mark W. Anderson, La Jolla, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Robert C. Anderson Oil Properties has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated January 30, 1985, affirming assessments of liquidated damages and civil penalties for certain incidents of noncompliance with respect to the No. 1 Federal well on oil and gas lease NM-18498.

Between November 27, and 29, 1984, BLM issued seven notices of incidents of noncompliance (INC) to appellant. Six of these INC's required appellant to correct various violations of Departmental regulations governing onshore oil and gas operations, and ordered removal, within 15 days, of "several old [half] empty chemical drums at the battery and well site" and removal of the "equalizer line from tank No. 63195 to the salt water tank and the drain and/or circulation line on back of the stock tanks that connect to the salt water tank." BLM stated that failure to correct each INC

timely would result in the assessment of \$ 250 pursuant to 43 CFR 3163.3(a). 1/ With respect to the seventh INC, BLM stated that appellant was assessed \$ 100 pursuant to 43 CFR 3163.3(e) for failure to have a well sign, as required by 43 CFR 3162.6(a). The record contains a return receipt card for certified mail sent to appellant on November 30, 1984, and received December 5, 1984, which bears the handwritten notation "Bill # A 31094." 2/

On December 31, 1984, BLM issued three INC's. The third notice (3 of 3) was for failure to report. BLM assessed \$ 100 pursuant to this INC. The second notice (2 of 3) stated that appellant had received an INC "[o]n 12-5-84" requiring it to remove chemical drums while the first notice (1 of 3) stated that appellant had received an INC "[o]n 12-5-84" requiring it to remove certain unnecessary piping. Both of these latter two INC's stated that appellant had failed to comply with the earlier INC's within the required 15 days and that appellant was assessed \$ 250 pursuant to 43 CFR 3163.3(a) for failure to comply with a written order. The INC's also required compliance within 10 days. The record indicates that bills for collection were also sent to appellant in connection with these three INC's and appellant received the INC's and collection bills on January 4, 1985. 3/ In addition, the Associate District Manager, Roswell District Office, by letter dated December 31, 1984, which referred "to Notice of Incidents of Noncompliance (INC) page 1, and dated December 28, 1984 on lease NM-18498," informed appellant that a civil penalty "is being charged each day according to 43 CFR 3163.4 until the violation is corrected" beginning with receipt of the INC on December 5, 1984. 4/ Appellant was notified of its right to request a technical and procedural review under 43 CFR 3165.3.

By letter dated January 11, 1985, appellant requested BLM to abate the "penalties" assessed. Appellant acknowledged that it had received, on January 4, 1985, "BLM's December 31, 1984 letter and the accompanying penalty notices" but stated that:

The BLM's letter of December 31, 1984 indicates that Notice of Incidents of Noncompliance were received by us on December 5, 1984. The only item we have record of receiving is an invoice

1/ We note that on Feb 20, 1987, the Department published final rulemaking, with an effective date of Apr. 21, 1987, substantially revising the regulations in 43 CFR Part 3160. 52 FR 5384.

2/ The record also contains a receipt for the payment of \$ 100 by appellant on Dec. 18, 1984, with respect to bill No. A 301094 for "[n]oncompliance with 43 CFR 3162.6(a) (Well sign)."

3/ The third INC advised that no monthly report of operations required by 43 CFR 3162.4-3 had been received since June 1984. A bill for the automatic assessment of \$ 100 as provided under the regulation was also included and appellant was granted 30 days for compliance.

4/ The Dec. 31, 1984, letter only cites 43 CFR 3163.4 as authority for the levy of penalties. That regulation was removed from applicable Departmental regulations effective Oct. 22, 1984. See 49 FR 37365 (Sept. 21, 1984). The relevant provision is 43 CFR 3163.4-1, Administrative Penalties.

for \$ 100.00 for failure to have a well sign. We paid the invoice on December 10, 1984.

Appellant also stated that all of the violations were corrected "by January 9, 1985," and argued that the civil penalties were "excessive."

The Deputy State Director, Mineral Resources, New Mexico State Office, BLM, in his January 1985 decision, affirmed the December 1984 INC's, assessing \$ 250 each for failure to remove the chemical drums and failure to remove the unnecessary piping. He also affirmed the December 1984 letter of the Associate District Manager assessing "civil penalties" because such actions were "proper and justifiable," because violations were not corrected in the time allowed. In its statement of reasons for appeal, appellant reiterates the statements made in its January 1985 letter.

On the state of the record at the time of its receipt, the Board was unable to conclude that appellant in fact had ever received the November 1984 INC's on December 5, 1984, as BLM stated in the December 1984 INC's. Thus, on April 4, 1986, this Board issued an order directing BLM to provide "additional information" in support of its conclusion that appellant received the November 1984 INC's. Appellant was given an opportunity to respond to any BLM submission.

On May 5, 1986, BLM submitted a memorandum dated April 17, 1986, in which the Deputy State Director stated that it was BLM policy, in the case of several INC's, to "mail copies together in one envelope via certified mail return receipt requested," but conceded that BLM has "no evidence that copies of all 7 INC forms were sent." The Deputy State Director, however, concluded that "payment of \$ 100.00 for the violation of INC listed as 'page 7 of 7' and the correction of 3 of the 7 violations [on January 8, 1985, as noted on the December 1984 INC's,] suggest that the operator did, in fact, receive copies of all 7 INC's." In an attached brief, the Office of the Field Solicitor, on behalf of BLM, argues that the Deputy State Director's memorandum provides "circumstantial evidence" of appellant's knowledge of the November 1984 INC's and that appellant's admitted receipt of the one INC ("page 7 of 7") put it on inquiry notice of all 7 INC's, citing Falls Sand & Gravel Co. v. Western Concrete, Inc., 270 F. Supp. 495, 504 (D. Mont. 1967).

In a reply brief, appellant states that it admits to having received only a "bill totalling \$ 100.00 for failure to have a well sign" on December 5, 1984, and that "nowhere on this bill is the phrase 'page 7 of 7.'" Appellant also states that it corrected the violations "on January 8 and January 9, 1985" in response to the notices "received on January 4, 1985." Appellant argues that it has been the "victim of incomplete certified mailings" by BLM and that the "penalties" assessed should be abated.

The November 1984 INC with respect to removal of chemical drums (page 1 of 7) was issued in accordance with 43 CFR 3162.5-1(a) which requires a lessee to conduct operations "in a manner which protects the mineral resources, other natural resources, and environmental quality." The INC was consistent with that regulation. Similarly, the November 1984 INC with respect to

removal of the unnecessary piping (page 5 of 7) was issued in accordance with 43 CFR 3162.7-1(d) which requires a lessee to conduct operations "in such a manner as to prevent avoidable loss of oil and gas." The INC was consistent with that regulation.

Indeed, appellant does not contest the propriety of BLM's issuance of the two November 1984 INC's involved herein or that it failed to take corrective action until early January 1985. Generally, where a lessee fails to comply with a written order of an authorized BLM officer, BLM is entitled to assess \$ 250 as liquidated damages pursuant to 43 CFR 3163.3(a) "if compliance is not obtained within the time specified." Mont Rouge, Inc., 90 IBLA 3 (1985); Willard Pease Oil & Gas Co., 89 IBLA 236 (1985). However, appellant argues that it never received the November 1984 INC's, and that it should therefore not be assessed liquidated damages for failure to comply by the deadline stated therein. We agree.

In the December 1984 INC's BLM stated that appellant received the two November 1984 INC's on December 5, 1984. However, the record does not support that conclusion. As we noted in our April 1986 order, the record establishes that BLM mailed something to appellant by certified mail, return receipt requested, on November 30, 1984, and that it was received on December 5, 1984. The return receipt card bears a handwritten notation which indicates the mailing contained only a bill for the payment of liquidated damages pursuant to 43 CFR 3163.3(e) for failure to have a well sign. Appellant admits to receiving that bill. BLM has submitted no proof that the mailing contained any of the seven November 1984 INC's and the Deputy State Director admits that BLM has "no evidence that copies of all 7 INC forms were sent."

BLM bases its assertion that appellant had knowledge of the two November 1984 INC's on circumstantial evidence. In appropriate circumstances, such evidence would be probative. See United States v. Mowat, 582 F.2d 1194, 1201-03 (9th Cir.), cert. denied, 439 U.S. 967 (1978). However, the evidence offered by BLM does not establish that appellant was sent, received or even knew of the INC's. Rather, the evidence supports appellant's claim, that he received only a bill for collection of \$ 100 in payment of liquidated damages for failure to have a well sign. The record contains a copy of the official receipt for that bill, which apparently is a carbon of that bill (Form 1371-22 (February 1984)) and states that appellant was subject to an "automatic assessment" pursuant to 43 CFR 3163.3(e). There [**10] was no reference to an earlier INC (or to "page 7 of 7") and, indeed, there is no proof that the applicable INC ("page 7 of 7") was included in the letter, despite the Field Solicitor's assertion that it was received. BLM also relies on the fact that appellant corrected the violations on January 8, 1985, as proof that appellant received the November 1984 INC's. However, this may also serve to prove appellant's position that it received the December 1984 INC's on January 4, 1985, and promptly took corrective action in response to those INC's. The corrective action was certainly in accord with the 10 days compliance period provided in the INC's.

Based on the evidence, we conclude that the record does not support the BLM conclusion that appellant was either sent, received or had knowledge of

the two November 1984 INC's requiring it to remove chemical drums and unnecessary piping. As a matter of elementary due process, appellant could not be properly assessed liquidated damages pursuant to 43 CFR 3163.3(a) in the absence of actual or constructive notice of those INC's and an opportunity to achieve compliance in accordance therewith. Cf. Anadarko Production Co., 91 IBLA 154 (1986); Riviera Drilling & Exploration, 87 IBLA 357, 361 (1985). The regulations virtually require service of the order of an authorized BLM officer on a lessee. 43 CFR 3161.2 provides that an officer may issue a written order or an oral order "confirmed in writing * * * within 10 working days from issuance thereof." Moreover, 43 CFR 3162.3(b) provides that service of an order on an operator, "when delivered personally or by ordinary mail, will be deemed to be service upon the lessee." (Emphasis added). See 43 CFR 1810.2(b). Without service of the INC's, or at least actual or constructive notice of the contents thereof, a lessee cannot be said to have fair notice of what compliance is required and the time for compliance. In such circumstances, we will overturn an assessment of liquidated damages pursuant to 43 CFR 3163.3(a). Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (1980). Accordingly, we hereby reverse the January 1985 BLM decision to the extent it affirmed the assessment of \$ 250 each for failure to comply with the two November 1984 INC's involved herein.

There is the additional matter to be addressed in this appeal, that of the administrative penalty levied by BLM in the December 31, 1984, letter to appellant. That penalty was expressly levied with respect to a single "violation" in connection with "Notice of Incidents of Noncompliance (INC) page 1, and dated December 28, 1984 on lease NM-18498." That INC involved only the failure to remove unnecessary piping. There is no evidence that BLM levied an administrative penalty for failure to remove chemical drums, or any other violation. With respect to the cited violation, BLM stated that the penalty was being levied "[b]ecause the violation was not corrected within the time allowed."

For purposes of the assessment of liquidated damages, BLM treated appellant's act of noncompliance as the failure to comply with a written order of an authorized BLM officer (the November 1984 INC) and, accordingly, the December 1984 INC's in assessing such damages expressly relied on 43 CFR 3163.3(a). 43 CFR 3163.4-1(a) provides that a lessee is also liable for administrative penalties for failure to "comply with * * * applicable orders * * * of the authorized officer," but only where the officer gives the lessee "notice in writing to remedy any defaults or violations" and "the violation continues beyond the date specified in the notice." A violation will be deemed to continue where there is a "failure to complete the necessary remedial action within the time and in the manner prescribed by the notice." 43 CFR 3163.4-1(a)(2). In addition, 43 CFR 3163.4-1(a)(4) provides that notice of a proposed penalty "shall be issued and served by personal service by an authorized officer or by certified mail," and that service is deemed to occur "when received or 5 days after the date it is mailed, whichever is earlier." The December 1984 INC's were the only written notices issued subsequent to the November 1984 INC's. The December notices provided appellant an additional opportunity (10 days), as required by 43 CFR 3163.4-1(a), to

achieve compliance with those original orders before the levy of administrative penalties. The December 1984 INC's, however, were issued at the same time as BLM levied the penalty. Appellant was therefore not accorded an opportunity to avoid the levy of a penalty. The BLM decision to levy a penalty was improper even assuming that appellant had received the original orders on December 5, 1984, because BLM was precluded from levying a penalty where appellant's compliance by January 9, 1985, was within the 10-day period of time specified in the December 1984 INC's.

Accordingly, we hereby reverse the January 1985 BLM decision to the extent it affirmed the levy of an administrative penalty for failure to remove the unnecessary piping.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Gail M. Frazier
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge.

